No. 81-6779

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LARRY WILLIAMS,

Appellant

v.

STATE OF INDIANA,

Appellee

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

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The Appellee, the State of Indiana, respectfully moves this Court to dismiss this appeal or affirm the judgment of the Supreme Court of Indiana entered by that Court in cause number 1280-S-443 on January 19, 1982.

OPINION BELOW

The Opinion of the Supreme Court of Indiana appears at 430 N.E.(2) 759 and a copy thereof is appended to the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Appellant and Larry Perkins decided to blackmail Jesse Hubbard as he was a homosexual. They went to his apartment, drank beer and smoked some marijuana. Perkins hit Hubbard with a pistol and Appellant stabbed him and took his billfold containing twenty dollars. Hubbard bled to death due to a stab wound of the heart. Appellant had a prior conviction for murder and at a separate hearing the jury recommended the

death penalty which recommendation was accepted by the trial judge and Appellant was sentenced to death.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

I.

THE INDIANA DEATH PENALTY SCHEME IS NOT IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER

Appellant's complaint that the Indiana death penalty statute is unconstitutional because of the discretion granted prosecuting attorneys in seeking the death penalty is not supported by the teachings of this Court. In support of this argument Appellant cites Furman v. Georgia (1972), 408 U.S. 238. Appellant's reliance is misplaced as this Court said in Gregg v. Georgia (1976), 428 U.S. 153 where Mr. Justice White said at page 225:

> "Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment a lesser penalty or are acquitted or never charged seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder."

This argument was also rejected in the opinion authored by Mr. Justice Stewart in Gregg, supra at page 199 as follows:

"First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and Georgia Board of Pardons and Paroles.

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."

Appended at this point in the opinion was the following footnote:

"The petitioner's argument is nothing more than a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury

> nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.
>
> Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, and Rogers v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment. In the federal system it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death. U.S. Const., Art, II, § 2."

See also Jurek v. Texas (1976), 428 U.S. 262; Proffit v. Florida (1976), 428 U.S. 242 and Spinkellink v. Wainwright (1978) (C.A.5) 578 Fed.2d 582, cert. denied 440 U.S. 976.

II.

THE INDIANA STATUTE IS NOT UNCONSTITUTIONAL IN THAT IT PERMITS PROSECUTORS TO PLEA BARGAIN WITH THE DEATH PENALTY

Appellant argues that the power of the individual prosecuting attorneys to use the threat of charging one with the death penalty in the plea bargaining process is an unconstitutional burden upon his right to a jury trial and upon his right against compelled self-incrimination. In support of this argument Appellant relies upon United States v. Jackson (1968), 390 U.S. 570 where this Court held that the death sentence provided by the Federal Kidnapping Act was unconstitutional since only those insisting upon a jury trial faced the possibility of a death sentence whereas those tried to the court or upon a plea of guilty faced only life imprisonment. The Indiana statute does not contain such an impermissible burden since the death penalty may be imposed after a plea of guilty; trial by the court as well as after a plea of not guilty followed by a jury

trial and verdict of guilty. Indiana Code, Section 35-50-2-9 in part, provides as follows:

> "(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing."

In Brady v. United States, (1970) 397 U.S. 742, this Court ruled that a guilty plea is not "coerced" merely because a defendant escapes the possibility of a death sentence by pleading guilty. In so holding the court said:

> "But we cannot hold that is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.
>
> "A contrary holding would require the State and Federal Gvoernment to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far."

Further in the case of Bordenkircher v. Hayes (1978), 434 U.S. 357 Hayes was charged with uttering a forged instrument and the prosecutor offered to permit him to plead guilty in return for a five year sentence. If Hayes refused the prosecutor would seek an indictment under the habitual offender statute. Hayes refused the plea agreement, was indicted and after trial received a sentence of life imprisonment. In upholding the action of the prosecuting attorney this Court said:

> "It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies.

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.[8] Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446. To hold that the prosecutor's desire to induce a guilty plea is an unjustifiable standard, which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."

This was followed by Corbitt v. New Jersey (1978), 439 U.S. 212 where this Court upheld a New Jersey statute which provided a mandatory sentence of life imprisonment for a defendant convicted of first degree murder by a jury, but that also allowed the possibility of a sentence of less than life imprisonment for a defendant who entered a plea of non vult as follows:

> "The States and the Federal Government are free to abolish guilty pleas and plea bargaining; but absent such action, as the Constitution has been construed in our cases, it is not forbidden to extend a proper degree of leniency in return for guilty pleas."

III.

THE INDIANA STATUTE DOES PROVIDE FOR MEANINGFUL APPELLATE REVIEW OF ALL DEATH PENALTY CASES.

Appellate next argues that the Indiana death penatly statute does not provide for meaningful appellate review of death penalty cases for two reasons. One, the statute fails

to outline a procedure to distinguish the few cases in which the death penalty is imposed from the many in which it is not; and, Two, the statute fails to establish guidelines for review in order to insure even handed application. The Indiana statute is similar to the Florida statute which was approved by this Court in Proffitt, supra as follows:

> "The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.14(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to [guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . .
> If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. State v. Dixon, 283 So.2d 1, 10 (1973)."

* * * * *

> "Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibily to perform its function of death sentence review with a maximum of rationality and consistency."

Appellant ignores the decision of the Supreme Court of Indiana in the case of Judy v. State (1981), ___ Ind. ___, 416 N.E.(2) 95 wherein Judy voluntarily waived his right to appeal his conviction and sentence of death but the Supreme Court of Indiana proceeded to review the actions of the trial court in imposing the death penalty to assure that the death penalty was

not "wantonly" or "freakishly" imposed. The Court said:

> "Further, our scheme provides for a procedure which enables this Court to review the imposition of the death penalty to further safeguard against the influence of improper or prejudicial factors at the trial level, and to further determine that the elements of arbitrariness and capriciousness condemned by Furman v. Georgia, supra, were not present in the sentencing decision. With the above considerations and guidelines in mind, this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures consistency, fairness, and rationality in the evenhanded operation of the death penalty statute."

The Indiana death penalty statute passes constitutional muster and the automatic review by the Supreme Court of Indiana in every case where the death penalty is imposed assures consistency, fairness and rationality in the evenhanded operation of the law.

CONCLUSION

For the foregoing reasons, the Appellee respectfully moves the Court to dismiss this appeal and affirm the judgment of the Supreme Court of Indiana.

Respectfully submitted,

LINLEY E. PEARSON
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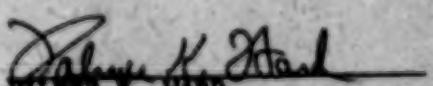
By: 
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